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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1969

No. 1548

JOSEPH MAIORANI,

Petitioner,

against

KAWASAKI KISEN K.K. KOBE,

Respondent,

against

PITTSTON STEVEDORING CORPORATION,

Respondent.

BRIEF OF RESPONDENT KAWASAKI KISEN K.K. KOBE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent opposes the granting of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, dated January 30, 1970, on the ground that the decision was correct and does not involve any question warranting consideration by this Court.

Facts and Question Presented

The United States District Court for the Southern District of New York dismissed this personal injury action on April 15, 1969, for failure to prosecute. Plaintiff moved to set aside the judgment and the District Court, in an opinion dated June 4, 1969, declined to do so.

Plaintiff appealed to the Second Circuit Court of Appeals, which affirmed in an opinion decided January 30, 1970. Plaintiff then petitioned for a rehearing; and for a rehearing containing a suggestion the action be reheard *in banc*. Both petitions were denied on February 24, 1970.

This question is now presented: should the United States Supreme Court review all of this discretionary judicial action?

Reasons for Denying the Writ

It is not the practice of our Supreme Court to review matters of discretion, particularly where the Circuit Court has found there has been no abuse of discretion.

Plaintiff's own brief in the Circuit Court formulates the appellate issue thus (quoting in full from his brief, page 4):

"QUESTION PRESENTED

> "Did Judge MacMahon abuse his discretion by dismissing the action on April 15, 1969 and by refusing to set the judgment aside on appellant's motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure."

Respondent agrees that was the Circuit Court issue.

The Circuit Court wrote (see page D-3 of Petitioner's Appendix):

> "On these facts we perceive no abuse of discretion by the trial judge, quite apart from his further finding that a review of the files showed there were other attorneys who had acted for plaintiff and could have conducted the trial."

Petitioner has shown no conflict in decisions between or among the circuits; and he has raised no federal question.

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Argument

Petitioner has created a classic "straw man", anent the case of *Link* v. *Wabash R.R.*, 370 U.S. 626. Petitioner says the Circuit Court "apparently relied on (that) case" (page 5 of his brief).

Although *Link* v. *Wabash* does not require support from or justification by this respondent, let us nevertheless, for the sake of accuracy, focus on the treatment given *Link* by both lower courts. We quote from the District Court opinion (p. E-5 of Petitioner's appendix):

> "Plaintiff is not within a remedy. Where 'an attorney's conduct falls substantially below what is reasonable under the circumstances, *the client's remedy* is against the attorney in a suit for malpractice.' " (Citing *Link* v. *Wabash R.R.*, 370 U.S. 626, *634 n. 10* (1962). (Emphasis added to text and citation.)

Next, we quote from the Circuit Court opinion (p. D-3 of Petitioner's appendix):

> "He deliberately absented himself without any request for a further adjournment under Calendar Rule 7(b)(1). When a case has reached this stage, counsel cannot make himself unavailable, even temporarily, without providing a stand-by, as the trial judge thought he in fact had done. Opposing counsel, their witnesses, and parties to other cases awaiting trial have rights too, and *the client is not without a remedy. Link* v. *Wabash R.R.*, 370 U.S. 626, *634 n. 10* (1962)." (Emphasis added to text and citation.)

It is hence seen that *Link* was cited for the limited, above-quoted principle.

The dismissal in the case before this Honorable Court was premised upon much broader bases: (a) primarily the *facts* of the case; (b) the exercise of judicial discretion

which was reviewed by the district court on motion and by the circuit court on appeal; (c) the applicability of case law including but not limited to *Link* v. *Wabash*; and (d) the applicability of the Federal Rules of Civil Procedure and of local, district court calendar rules.

Second Circuit decisions are unanimous in upholding the trial judge's power to exercise discretion in alleviating calendar congestion. Certiorari was recently denied in an analogous case concerning the denial of a trial adjournment, *Davis* v. *United Fruit*, 402 F. 2d 328, certiorari denied, 393 U.S. 1085.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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of Counsel.

June 3, 1970.